Supreme Court, U.S.
FILED

011018 DEC 26 2001

OFFICE OF THE CLERK

No.

In the

# Supreme Court of the United States

PONDEROSA DAIRY, PAHRUMP DAIRY, ROCKVIEW DAIRIES, INC., and DARRELL KUIPER and DIANE KUIPER d/b/a KUIPER DAIRY,

*Petitioners*,

v.

WILLIAM J. LYONS, JR., Secretary, Department of Food & Agriculture, State of California, and ROBERT TAD BELL, Undersecretary, Department of Food & Agriculture, State of California,

*Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

JOHN H. VETNE
15 Powow St.
Amesbury, MA 01913
978-388-2480

RICHARD HESSE
*Counsel of Record*
2 White Street
Concord, NH 03301
603-228-1541

*Attorneys for Petitioners*

33pp

## QUESTIONS PRESENTED

1. May a court fulfill its duty under the "clear statement" standard applicable to federal laws that would alter the Constitutional balance between state and federal governments by (a) drawing inferences of Congressional intent from statements of industry spokesmen in legislative subcommittee hearings predating the introduction of the proposed law in dispute, and (b) without examining the factual fit between the specific state regulatory scheme and specific language employed by Congress?

2 Is substantive judicial review of discriminatory effect under the Privileges and Immunities Clause foreclosed as a matter of law where state discrimination is facially based on the out-of-state location of a farm or business, but statute does not expressly refer to out-of-state "residency" or "citizenship"?

## LIST OF PARTIES

The Petitioners are Ponderosa Dairy, Parhump Dairy, Rockview Dairies, Inc., Darrel and Diane Kuiper, d/b/a D.Kuiper Dairy. The Respondents are William J. Lyons, Jr., Secretary of the California Department of Food & Agriculture, and Robert Tad Bell, Undersecretary of the California Department of Food & Agriculture (hereinafter "CDFA").

## CORPORATE DISCLOSURE STATEMENT

None of the corporate Petitioners have issued stock or securities that are publicly traded, and none of the petitioners have a corporate parent, subsidiary or affiliate that has issued publicly traded stock or securities

## TABLE OF CONTENTS

QUESTIONS PRESENTED ..... i

LIST OF PARTIES ..... ii

CORPORATE DISCLOSURE STATEMENT ..... ii

TABLE OF CONTENTS ..... iii

TABLE OF AUTHORITIES ..... v

OPINIONS BELOW ..... 1

JURISDICTION ..... 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THE CASE ..... 2

STATEMENT OF THE CASE ..... 3

REASONS FOR GRANTING THE WRIT ..... 7

I. There Is a Compelling Need for Guidance by This Court To Further Instruct Lower Courts Concerning Application of the "Clear Statement" Standard When Applied To Alter the Balance Between Federal and State Governments. ..... 8

a. The Court of Appeals did not faithfully apply the "clear statement" rule to the text of § 144 of the 1996 Farm Bill ..... 10

b. The Court of Appeals did not faithfully apply the "clear statement" rule to the context of § 144 in the 1996 Farm Bill .. 16

II. There Is a Compelling Need for This Court To Reaffirm that State Discrimination Against Out-of-State Residents In Practical Effect, As Well as on the Face of State Law, Is Subject to Judicial Review Under the Privileges and Immunities Clause ..... 17

CONCLUSION ..... 24

## TABLE OF AUTHORITIES

**CASES**

Atascadero State Hospital v. Scanlon,
473 U. S. 234(1985) ..... 9

Baldwin v. Fish and Game Commission of Montana,
436 U.S. 371 (1978) ..... 18, 20

Bates v. Little Rock,
361 U.S. 516 (1960) ..... 19

Best & Co. v. Maxwell,
311 U.S. 454 (1940) ..... 21

Chalker v. Birmingham & N.W. Ry. Co.,
249 U.S. 522 (1919) ..... 22

Dellmuth v. Muth,
491 U.S. 223 (1989) ..... 10, 11, 12

Gregory v. Ashcroft,
501 U. S. 452 (1991) ..... 9

Hicklin v. Orbeck,
437 U.S. 518 (1978) ..... 20

Hilton v. S.C. Pub. Rys. Comm'n,
502 U.S. 197(1991) ..... 10

Hughes v. Oklahoma,
441 U.S. 322 (1979) ..... 21

Hunt v. Washington Apple Comm'n,
432 U.S. 333 (1977) ..... 21

Jones v. Rath Packing Co.,
430 U.S. 519 (1977) ..... 9

Kimel v. Florida Board of Regents,
528 U.S. 62 (2000) ..... 9

Lunding v. New York Tax Appeals Tribunal,
522 U.S. 287 (1998) ..... 19

Maine v. Taylor,
477 U.S. 131 (1986) ..... 21

Martin v. Occupational Safety and Health Review Comm'n,
499 U.S. 144 (1991) ..... 14

Oregon Waste Systems, Inc. v. Dept. of Environmental
Quality of the State of Oregon,
511 U.S. 93 (1994) ..... 21

Ponderosa Dairy v. Lyons,
259 F.3d. 1148 (9th Cir. 2001) ..... *passim*

Rice v. Santa Fe Elevator Corp.,
331 U.S. 218 (1947) ..... 9

Santa Fe Industries, Inc. v. Green,
430 U.S. 462 (1977) ..... 16

Shamrock Farms Co. v. Veneman,
146 F.3d 1177 (9th Cir. 1998) ..... *passim*

South-Central Timber Development, Inc. v. Wunnicke,
467 U.S. 82 (1984) ..... 9

Sporhase v. Nebraska ex rel. Douglas,
458 U.S. 941 (1982) ..... 9

Supreme Court of New Hampshire v. Piper,
470 U.S. 274 (1985) ..... 18, 19, 20, 21

Tolchin v. Supreme Court of New Jersey,
111 F.3d 1099 (3d Cir. 1997) ..... 22

Toomer v. Witsell,
334 U.S. 385 (1948) ..... 18

United Building and Construction Trades v. Mayor,
465 U.S. 208 (1984) ..... 21

West Lynn Creamery, Inc. v. Healy,
512 U.S. 186 (1994) ..... 3, 8, 20, 21

Wilder v. Apfel,
153 F.3d 799 (7th Cir. 1998) ..... 10

Will v. Michigan Dept. of State Police,
491 U. S. 58 (1989) ..... 9

**CONSTITUTIONAL PROVISIONS**

U.S. Const. Art. I, Section 8, clause 3
(Commerce Clause) ..... 2

U.S. Const. Art. IV, Section 2
(Privileges and Immunities Clause) ..... i, 2

**STATUTES AND REGULATIONS**

7 U.S.C. § 601 *et seq.* (The Agricultural Marketing
Agreement Act of 1937) ..... 4

The Federal Agriculture Improvement and Reform Act of
1996, Pub. L. No. 104-127, 110 Stat. 914 (1996)
("1996 Farm Bill) ..... *passim*

28 U.S.C. §1254(1) ..... 2

28 U.S.C. § 1331 ..... 9

28 U.S.C. § 1337 ..... 9

28 U.S.C. § 1343(a)(3) ..... 9

7 C.F.R. PARTS 1000-1199 ..... 7

21 C.F.R. PART 131 ..... 4

MISCELLANEOUS PUBLICATIONS

California Department of Food and Agriculture

California Dairy Stats., 2000 Annual ..... 8

*Riding the Milk Price Roller Coaster* (Nov. 1999) ..... 8

*Welcome to California Milk and Dairy Foods Control* http://www.cdfa.ca.gov/ahfss/mdc/index.htm ..... 4

Food and Drug Administration, "The FDA Consumer," Ingredient Labeling: What's in a Food? (May 1993) ..... 4

National Agricultural Statistics Service, U.S. Department of Agriculture

Census of Agriculture, 1997 ..... 18

## PETITION FOR WRIT OF CERTIORARI

Ponderosa Dairy, Pahrump Dairy, Rockview Dairies, Inc., and Darrel and Diane Kuiper d/b/a/ D. Kuiper Dairy respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on August 9, 2001, rehearing and rehearing en banc denied on September 24, 2001. Review by this Court is in order because the Court of the Appeals decided important federal questions, with significant national economic impact, in a manner that conflicts with decisions of other circuit courts, conflicts with decisions of this Court, and represents a far-reaching departure from the accepted and usual course of judicial proceedings in matters of Commerce Clause and Privileges and Immunities jurisprudence.

## OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit is reported at 259 F.3d 1148 and is reprinted in the Appendix at A1-15,[1] The Order of the United States Court of Appeals for the Ninth Circuit denying Petitioner's request for rehearing and rehearing *en banc* is unreported and is reprinted in the Appendix at A59-60. The Opinion and Order of the United States District Court for the Eastern District of California granting summary judgment in favor of the Respondent and denying Petitioner's Motion for Summary Judgment is unreported and is reprinted in the Appendix to this Petition at A16-A22.

---

[1] Citations to material printed in the Appendices appear herein as "A__." The Appendix is reproduced and attached to the companion petition in the matter of Hillside Dairy, Inc. v. Lyons, arising from the same 9th Circuit Decision.

## JURISDICTION

Petitioners seek review of the ruling of the United States Court of Appeals for the Ninth Circuit, dated August 9, 2001, affirming the Order issued by the United States District Court of the Eastern District of California, granting California's motion for summary judgment and dismissing petitioners' complaint. The Ninth Circuit held that section 144 of the 1996 Farm Bill (Federal Agriculture Improvement and Reform Act of 1996, Pub. L. No. 104-127, 110 Stat. 914-930 (1996) (codified as amended in scattered sections of 7 U.S.C.) (the "Farm Bill")) provided immunity to each of California's separately administered milk regulation programs from the dormant Commerce Clause, and the practical effect of the state's discrimination on out-of-state residents was not reviewable under the Privileges and Immunities Clause. On August 23, 2001, petitioners requested rehearing and rehearing *en banc* from the United States Court of Appeals for the Ninth Circuit. By Order dated September 24, 2001, the court denied this request. App. A59-60. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1), and Petitioners file this request for certiorari within the time allotted in accordance with Supreme Court Rule 13.1.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THE CASE

U.S. Const. art. I, § 8, cl. 3 (the "Commerce Clause") provides: "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

U.S. Const., Article IV Section 2, and Amendment XIV, § 1, (the "Privileges and Immunities Clause") provides: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States"

Relevant excerpts from the Federal Agriculture Improvement and Reform Act of 1996 (Pub.L. No. 104-127 (Apr. 4, 1996), 110 Stat. 888 et seq.,Title I, Subtitle D, Chapter 1 – Dairy (§§ 141-152), *codified in part at* 7 U.S.C. §§ 7251-7259 (herein the "1996 Farm Bill"), are set forth in the Appendix at App A62-78. Excerpts from the milk "pooling" rules at issue are contained at App. 79-95

## STATEMENT OF THE CASE

Individual states have made persistent efforts to use milk regulation to prop up local farm prices by insulating local markets from out-of-state competition. It has followed that a "large number of [this Court's] Commerce Clause cases arose out of attempts to protect local dairy farmers." *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 n.22 (1994). This is another such case. The 9th Circuit, however, did not reach the merits of discriminatory and protectionist features of California's milk regulatory scheme under the Commerce Clause or Privileges and Immunities Clause, because it found instead that the Commerce Claims were barred by Congress and the Privileges and Immunities Claims were not cognizable because the state milk laws did not, on their face, differentiate against out-of-state residents.

### I. The Petitioners' Business.

Petitioners operate dairy farms in the States of Arizona and Nevada. Darrel and Diane Kuiper are natural persons and proprietors of D. Kuiper Dairy, a farm in Buckeye, Arizona, where they reside. The Nevada dairy farms are Ponderosa Dairy, an operating unit of Rockview Dairies, a privately held California Corporation, and Pahrump Dairy, operated by a California partnership.

## II. The Regulatory Setting.

California's dairy industry has been heavily regulated by the State of California since before the 1940's. These regulatory schemes are similar to federal regulation of the dairy industry in most of the other contiguous 47 states. Three different branches of the California Department of Food and Agriculture ("CDFA") administer three major state programs: (1) the Dairy Marketing Branch of CDFA administers the Milk Stabilization Plan through which minimum prices are established and enforced against processors of raw milk, (2) the Milk Pooling Branch administers a plan through which revenue from the sale of raw milk is pooled and distributed among California dairies, and (3) the Milk and Dairy Foods Control Branch enforces state compositional standards, labeling requirements and health requirements. App. A3-A5; CDFA, "*Welcome to California Milk and Dairy Foods Control*", www.cdfa.ca.gov/ahfss/mdfc/index.htm. In the federal system, the United States Department of Agriculture regulates minimum milk prices and oversees pooled revenue distribution to dairy farmers. 7 U.S.C. § 601 *et seq.* (The Agricultural Marketing Agreement Act of 1937); 7 C.F.R. Parts 1000-1199. The Food and Drug Administration, Department of Health and Human Services, oversees composition and health standards for milk and other foods under the Food, Drug and Cosmetic Act. *See* 21 C.F.R. Part 131. The FDA has explained that food composition or identity standards are consumer product "recipes."[2]

California's "quota" system for pooled milk revenue distribution and associated benefits are expressly limited by

---

[2] Identity standards were developed under authority of the 1938 Food Drug & Cosmetic Act by "standardized recipes for such foods as dairy products, mayonnaise, ketchup, jelly and orange juice ..." Food & Drug Administration, The FDA Consumer, *Ingredient Labeling: What's in a Food?* (May 1993).

law to in-state farms. Calif. Food & Agric. Code § 62700 *et seq*. Until July 1,1997, California's pooling plan did not apply to milk from out-of-state dairy farmers. California processors could make payment directly to out-of-state dairy farmers, and did not have to pay a portion of the processors' minimum classified price obligation to the pool for blending and redistribution among California's dairy farmers.

In 1997, under pressure from members of the California dairy industry to deal with the out-of-state milk problem, CDFA undertook to amend the pooling plan, for the first time, to pool out-of-state milk (App. A4-5, A79-95). As of July 1, 1997, CDFA amended its minimum price regulation of out-of-state "other source" milk by requiring handlers to pay part of the price to the pool, and part to the out-of-state dairy farmer. (App. A89, § 900(d)). Thus, out-of-state dairy farmers were forced to share a portion of their revenue with their competitors -- California dairy farmers. Out-of-state dairy farmers continue to be barred, however, from enjoying the benefits of quota ownership, including the benefit of not having to incur transaction costs searching for the highest use buyer for their milk on a month-to-month basis. *See* App. A11-A12. CDFA now assigns the out-of-state milk a handler "credit" against the minimum regulated price that, by its design, restricts the out-of-state dairy farmer from ever attaining (or exceeding) the revenue enjoyed by California milk quota holders. More to the point, the record in the proceedings below (which the lower courts disregarded) demonstrate that the imposition of a pooling obligation on out-of-state milk has resulted in a dollar-for-dollar reduction in the price received by out-of-state dairy farmers on their sales of raw milk into California.

## III. The Proceedings Below.

In June 1997 Ponderosa petitioners, along with Hillside petitioners in the separate companion case, brought suit against the Secretary and Undersecretary of the California Department of Food and Agriculture in the United States District Court for the Eastern District of California seeking injunctive and declaratory relief. The Ponderosa plaintiffs argued that the 1997 amendments to the California milk pooling regulations violated the dormant Commerce Clause, Equal Protection Clause and Privileges and Immunities Clause, because they illegally discriminated against out-of-state raw milk producers. (A5-A14). The Ponderosa and Hillside complaints were consolidated for purposes discovery and pretrial proceedings.

By Order dated July 21, 1999, the District Court granted summary judgment in favor of the defendants. The court did not reach the merits of the Commerce Clause claims. Instead, the court relied on the holding in *Shamrock Farms Co. v. Veneman*, 146 F.3d 1177 (9th Cir. 1998). In *Shamrock*, the Ninth Circuit concluded that section 144 of the Federal Agriculture Improvement and Reform Act of 1996 ("Farm Bill") immunized, *inter alia*, California's pooling laws from scrutiny under the Commerce Clause because they contributed to the establishment or enforcement of its fluid milk standards with respect to packaged milk sold in California. *See Shamrock*, 146 F.3d at 1182.

On appeal in the case at bar, the 9th Circuit affirmed. Although the 1997 pooling amendments were not before the prior *Shamrock* panel, the *Ponderosa* panel in this case deemed that it was bound by Judge Reinhart's opinion in *Shamrock*. The court below, therefore, did not undertake an independent review of the legislative fit between the 1997 amendments and the text or context of §144 of the Farm Bill. Additionally, the court below expanded §144, construing that

provision as pertaining to laws that "affect" California milk composition standards (App A10) rather than to laws designed "to effect" those standards, as Congress wrote. Finally, the 9th Circuit ruled that Petitioners' Privileges and Immunities Clause claims could not be considered, as a matter of law, because farm location discrimination is beyond the reach of facial discrimination against out-of-state residents, to which the Clause is addressed. App. A14.

## REASONS FOR GRANTING THE WRIT

This case presents important questions concerning the duty and limitations of federal courts when required to construe and apply a statute under this Court's exacting, but evolving, standard for a "clear statement" of legislative intent. It also presents an important opportunity for this Court to resolve conflict between the Ninth Circuit and decisions of the Third Circuit and this Court, concerning whether a state law that discriminates against non-residents in "practical effect," but is not discriminatory on the face of legislation, is subject to substantive judicial review under the Privileges and Immunities Clause.

As a very practical matter, what this Court may do or not do will affect the livelihood of every dairy farmer in the nation, for better or worse. Farm milk prices in USDA's milk marketing order system are directly based on the market value of unregulated milk commodities – cheese, butter and milk powder. 7 C.F.R. §§ 1000.50-54. These commodity prices are highly responsive to supply and demand. Even a relatively small increase or decrease in national milk production will produce a significant change in commodity prices, and therefore farm milk prices.[3]

---

[3] In 2000, national milk production increased by 3% over the prior year, but dairy farmer cash receipts, at $20.6 billion, were 11% ($2.6 billion) below 1999 income levels. National Agricultural Statistics Service,

There is, perhaps, no area of interstate trade in agriculture where the impulse of state governments to protect local farmers is stronger than the milk industry. *See, West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 n.22 (1994). The ability of California to insulate itself from the national market as a result of the lower court's decision, to shift the burden of surplus production across its state lines, or to protect its fluid market for benefit of local farmers, is of no small consequence to farmers from Arizona to Minnesota and New Hampshire. As detailed below, the lower court's reliance on inference from remote "legislative history" to shield California's milk industry from Commerce Clause constraints, and its miserly approach to practical effect of California protectionism on residents of neighboring states, deserve review by this Court.

## I. There Is a Compelling Need for Guidance by This Court To Further Instruct Lower Courts Concerning Application of the "Clear Statement" Standard When Applied To Alter the Balance Between Federal and State Governments.

The "clear statement" standard for discerning the statutory intent of Congress has been developed by this Court

---

USDA, *Milk Production, Disposition, and Income, 2000 Summary* (April 2001). California is the Nation's largest milk producing state, and accounts for over 18% of the nation's cheese production, 28% of U.S. butter production, and 49% of U.S. milk powder production (*Milk Production, supra*; California Department of Food and Agric., *California Dairy Stats. 2000 Annual* (T.16-17)(2001)(http://www.cdfa.ca.gov/dairy); National Agricultural Statistics Service, USDA *Dairy Products* (Da 2-6, Feb. 2001). California recognizes the influence of its milk market on the national market: "Extraordinary milk production in all of the major milk production regions (particularly in the states west of the Rocky Mountains) has been a major contributor to low commodity prices." Dairy Marketing Branch, California Department of Food and Agriculture, *Riding the Milk Price Rollercoaster* (November 1999), http://www.cdfa.ca.gov/dairy/page4.html.

to be applied by subordinate courts faced with a limited class of legislation -- most notably laws that would "alter the 'usual constitutional balance between the States and the Federal Government.'" *Will v. Michigan Dept. of State Police*, 491 U. S. 58, 65 (1989)(citation omitted). This line of authority includes cases involving exemption of states from the Union-binding force of the dormant Commerce Clause, *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 92 (1984) (plurality opinion); *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 960 (1982); abrogation of state sovereign immunity when necessary to protect 14th Amendment liberties, *Atascadero State Hospital v. Scanlon*, 473 U. S. 234, 242 (1985); interference with the state electoral process, *Gregory v. Ashcroft*, 501 U. S. 452, 460-461 (1991); and preemption of states' historic police powers, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

The "clear statement" standard has been defined as simply requiring a statutory application that is "plain to anyone reading the Act..." and no more. *Gregory v. Ashcroft*, 501 U.S. at 467. This practical rule assures that in the political process not only Congress, but also the President in signing a law into effect, acted intentionally to alter the constitutional balance. As revealed in the decisions by the 9th Circuit below, it has sometimes proved difficult to "keep it simple" in this evolving area of jurisprudence.

Because of its importance to the Constitutional balance, this court's opinions -- majority, plurality, dissenting, and concurring -- have frequently struggled to maintain integrity of the "clear statement" rule, *e.g.*, *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000)(in which the majority opinion by Justice O'Connor and the opinion by Justice Thomas, dissenting in part, both address the requirements of a "clear statement" standard, although the

issue was not necessary to disposition of the case); *Hilton v. S.C. Pub. Rys. Comm'n*, 502 U.S. 197, 209 (1991)(O'Connor, dissenting, cautioning that "the clear statement rule is not a mere canon of statutory interpretation. Instead it derives from the Constitution itself"). Some of this Court's opinions have eschewed any reliance on legislative history, *Dellmuth v. Muth*, 491 U.S. 223, 230 (1989)("congressional intent must be both unequivocal and textual"), while others have looked to legislative history at least to confirm the direction of the plain language of statutory text. The decisions of the 9th Circuit, as described below, provide compelling reason for this Court to address the outer limits of permissible reliance (if any) on extra-statutory inferences of legislative intent under the "clear statement" test.

**a. The Court of Appeals did not faithfully apply the "clear statement" rule to the text of § 144 of the 1996 Farm Bill.**

The 9th Circuit's opinion in *Ponderosa* directs the reader to Judge Reinhardt's *Shamrock* opinion as containing all the analysis required to conclude that the 1997 milk pooling rules challenged by the dairy farmer plaintiffs are immune from Commerce Clause scrutiny. App. A7-8. According to the court, *Shamrock* controls all milk pooling rules the State of California may devise, because "at least some of the pricing and pooling regulations were directly at issue" in that case. App. A10. The court rejected the notion it was relying on dicta rather than the holding of *Shamrock*. *Id.*[4]

---

[4] The danger of overreaching in a grasp for prior holdings to avoid substantive adjudication on the merits was adroitly explained by the Seventh Circuit: "to give the inessential parts of an [earlier] opinion the force of law would give Judges too much power, and of an *essentially legislative character*." *Wilder v. Apfel*, 153 F.3d 799, 803 (7th Cir. 1998)(emphasis supplied).

The 9th Circuit's decision in *Ponderosa* reveals that there is a need for this Court to make abundantly clear that the danger of judicial encroachment on legislative prerogatives is at its nadir when confronted by "clear statement" rules of construction applicable to federal laws that would alter the traditional balance between federal and state powers. We turn first to the facts and holding of *Shamrock*.

*Shamrock's* complaint was dismissed under Rule 12(b) for failure to state a claim based on "the facts alleged in the complaint," which were assumed to be true for purposes of review. App. A26-27. The regulatory facts to which Shamrock's complaint directed the court's attention were two-fold. The first involved "various California regulations that govern the composition of consumer milk," referred to in FDA and state regulatory parlance as "identity standards." App. A25. California requires fortification, with milk solids, of consumer milk products. *Id.* Also involved were regulations that Shamrock's complaint called the "pricing and pooling laws." These allegations were summarized by the *Shamrock* panel to set the stage for its decision as follows: "California also provides its milk processors with a fortification allowance, which reduces the cost of standardizing the milk. Shamrock asserts that California processors receive a competitive advantage against out-of-state processors because California only gives the fortification allowance to in-state processors." *Id.* It was in this factual context that the 9th Circuit ultimately concluded that Congress not only authorized California to avoid uniform milk standards applicable to the rest of the country, but it also authorized the state to further tip the competitive playing field by administering a subsidy to in-state processors, offsetting their costs of meeting the composition standard. The *Shamrock* panel reasoned:

> Although § 144 of the Farm Bill does not specifically refer to these laws, as it does to

> the milk composition standards, we conclude that the pricing and pooling provisions fall under the ambit of the prohibition against indirect limitations on laws, regulations, or requirements regarding milk standards. As we have noted, the various elements of the milk fortification scheme are interrelated and mutually interdependent.

*Id.* at A34. The *Shamrock* holdings did not address milk rules adopted for reasons other than composition standard compliance.[5]

In short, the facts regulatory upon which the Ponderosa and Hillside plaintiffs relied were very different from those in *Shamrock*. *Shamrock* involved application of

---

[5] To reach its conclusion of Congressional intent, the *Shamrock* Panel relied on a purported concession of Shamrock's counsel, and statements of California industry representatives in a subcommittee hearing about one year before the Farm Bill was enacted, and ten months before Section 144 first surfaced behind the doors of the House and Senate Farm Bill Conference Committee. App. A34. No history is cited, or available, from the Commerce Committees of the House or Senate, which have jurisdiction over the Food, Drug and Cosmetic Act, which contains the preemption clause California was seeking to avoid. See. App. A28, 46. The *Shamrock* opinion included the following subsidiary and necessary statutory interpretations to reach its "clear statement" holding about the reach of Section 144 of the Farm Bill (App. A29 –30): 1) that the phrase "this act or any other provision of law" clearly and unambiguously means the subject Farm Bill, the Food, Drug and Cosmetic Act, and all Constitutional powers that Congress may waive; 2) that the phrase "directly or indirectly" clearly and unambiguously modifies the prohibited reach of federal Commerce Clause limitation as well as the expanse of the state's authority, and 3) that the fortification allowance, referred to by Shamrock as a "pricing and pooling law," was clearly included by Congress within the reach of Section 144's protection, as an indirect means "to effect" the state's fluid milk composition and labeling requirements, and is therefore also immune from Commerce Clause scrutiny.

rules to fluid milk processors (bottling plant operators); *Ponderosa* complained of rules applicable to producers (dairy farmers). *Shamrock*'s attack on "pooling and pricing laws" was directed at the fortification allowance paid or credited to processors in the state Milk Stabilization Plan; the Ponderosa and Hillside plaintiffs challenged the state's distribution of raw milk revenues between dairy farmers under the Pooling Plan. The rules at issue in *Shamrock* were exclusively focused on fluid milk – i.e., milk used for packaged consumer milk products; the Pooling Plan redistributes revenue from all uses of raw milk, including 80% of California dairy farmers' milk production used for manufactured products such as cheese, butter, milk powder, ice cream, yogurt, and sour cream which § 144 of the 1996 Farm Bill does not address in any way. The 1997 pooling rules were not in existence in September 1996 when the district court dismissed Shamrock's complaint for failure to state a cause of action. App. A38. So *Shamrock*'s extension to the 1997 pooling amendments would credit the *Shamrock* court with deciding a Constitutional issue on facts not before the *Shamrock* court.

Purporting to follow *Shamrock*, the *Ponderosa* court did not undertake to apply the "clear statement" rule of statutory construction to the 1997 pooling regulations before it by measuring the "fit" of the contested regulations to the text and context of § 144 of the Farm Bill. Instead, it begged the question, relying on *Shamrock's* application of the "clear statement" rule to a set of very different regulations. Nor did the *Ponderosa* court even attempt to find a fit between the 1997 pooling regulations and reasoning of the *Shamrock* panel – that the "pricing and pooling" laws contested by Shamrock were protected because application of the Commerce Clause to them would constitute "indirect limitations on laws, regulations, or requirements regarding milk standards." App. A34.

Nor could the *Ponderosa* court have concluded, *sub silentio*, that the 1997 milk pooling regulations served in an indirect manner to advance enforcement or compliance with consumer fluid milk composition standards. Although California's Food and Agriculture Code includes generic reference to "standards of content and purity" as one of many legislative purposes for milk regulation (App. A8, *quoting from* Cal. Food & Agr. Code § 61802(c)), the Secretary of Food and Agriculture's Statement of Determination and Order did not find that the contested pooling rules were necessary as an indirect means of promoting the composition standards. App. A8-9.

Indeed, the assertion that the pooling amendments had an indirect relationship with the composition standards was advanced for the first time only by counsel for the Secretary, in the course of litigation, two years after the agency's rulemaking decision. This is not the sort of rationale this Court will ordinarily accept for agency action. *Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 157 (1991). Even the State's litigation assertion, adopted by the *Ponderosa* court to capture Commerce Clause immunity, only claimed, at best, that the raw milk pooling amendments somehow indirectly *affect* fluid milk. Neither the State's litigation arguments nor the court's conclusions describe how the amendments served to promote enforcement or compliance with composition standards for fluid milk products. The *Ponderosa* court said:

> Ponderosa and Hillside also contend that Shamrock is inapposite because § 144 only affects California's ability to regulate standards for "fluid milk products sold at retail or marketed in the State of California" [quoting Conference Committee report], as opposed to raw milk. Hillside's argument is unpersuasive because § 144 applies to "any

> provision of law" that "directly or indirectly" has an effect on fluid milk. Raw milk and fluid milk are closely related. It follows that the 1997 amendments which directly affect raw milk, indirectly affect fluid milk.

App A9-10.

In this analysis, the lower court both expanded *Shamrock* and edited the words of § 144 of the 1996 Farm Bill. The Farm bill shields California from construction of federal laws that would limit the State's authority "to establish *or continue to effect* any law, regulation, or requirement regarding" fluid milk standards and labeling. App. A39, emphasis provided. The verb "to effect" means to bring about; to achieve; to make it so. The *Ponderosa* court effectively rewrites the text of § 144 as though Congress used the word "affect" in the sense of influencing or being influenced by.

In short, the *Ponderosa* court turned the "clear statement" rule on its head, looking deferentially and inaccurately at the broad meaning of words used in *Shamrock* opinion to shield the 1997 pooling amendments from Commerce Clause scrutiny, rather than looking to the words of Congress for the requisite clear and unambiguous expression of legislative intent to allow the amended pooling rules to apply without regard to the impact on interstate commerce. The lower court's conclusion, that "all of California's milk pricing and pooling laws" enjoy blanket protection from Commerce Clause scrutiny (App. A7), represents not a faithful exercise of statutory construction, but rather an impermissible act of judicial legislation.

**b. The Court of Appeals did not faithfully apply the "clear statement" rule to the context of § 144 in the 1996 Farm Bill.**

Of course, a "clear statement" may be found, or ruled out, in statutory context if not expressly contained in specific statutory text. *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 477 (1977), *quoting Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 201 (1976). Neither *Ponderosa* nor *Shamrock* undertook to reconcile § 144 with other provisions of the Dairy Title of the Farm Bill set forth in App. 63a-79a. In this failure to look beyond the limited text of § 144, the two 9th Circuit opinions also operate in tension with additional directives of this Court. Other provisions of the Farm Bill, if examined, preclude the expansive reading given to §144 by the 9th Circuit.

Farm Bill §143(a)(2), for example, specifically addresses California's "quota" system, which the *Ponderosa* court recognized as the foundation of State's Pooling Plan. App. 3a-5a. In this section, Congress gave express federal protection to the quota system *if* California elected to participate in the reformed (and more uniform) Federal Milk Order system of milk price regulation. Section 145 expressly prohibits state milk pricing plans from employing an excessive manufacturing allowance for milk used in cheese, butter and milk powder. These adjacent provisions preclude a conclusion that Congress unambiguously gave blanket Commerce Clause exemption to California's pooling scheme in § 144.

In § 147, Congress gave express temporary approval for New England states to regulate some milk prices, conditioned, among other things, on how milk revenue is shared among farmers and precluding trade barriers. §147(7). Congress understood in section 147, as in sections 143 and 145, how to make reference to milk pricing and pooling laws.

The "clear statement" rule is not honored in this context by a conclusion that where Congress made no reference whatsoever to milk pricing and pooling laws in §144, it intended to provide California with blanket and perpetual Commerce Clause exemption without regard to trade barriers or inequity in revenue distribution between dairy farmers.

In §§ 148 and 149, Congress repeatedly expressed its objectives to operate the U.S. dairy program in a manner "consistent with the obligations of the United States as a member of the World Trade Organization." Yet, if *Ponderosa* and *Shamrock* are fully applied to extend "any other provision of law" to Congress' commerce powers, California is free to disregard the negative constraints of the foreign commerce clause, as well as the domestic commerce clause, and to interfere in the federal government's dealings with foreign powers in dairy trade matters.

In declining to undertake any examination of the contested rules against the statutory text as well as context of §144, the 9th Circuit opinion in *Ponderosa* expanded on the broad holding of Judge Reinhardt in *Shamrock*, and failed to conform to this Court's directives of what is required for "clear statement" statutory construction.

## II. There Is a Compelling Need for This Court To Reaffirm that State Discrimination Against Out-of-State Residents In Practical Effect, As Well as on the Face of State Law, Is Subject to Judicial Review Under the Privileges and Immunities Clause.

The 9th Circuit's decision is in conflict with law expressed by this Court and sister Circuits that the "practical effect" of a state classification on non-residents, not just its facial differentiation based on citizenship or residency, may be adjudicated in a Privileges and Immunities claim. The court held that the Privileges and Immunities Clause may be

invoked only where a state's discriminatory classifications, "*on their face*, ...[are] based on any individual's residency or citizenship" (App.A14, emphasis supplied). Accordingly, the court affirmed the trial court's dismissal of plaintiffs' Privileges and Immunities claim because the California's milk pooling scheme at issue facially differentiates among dairy farmers based on in-state or out-of-state farm location (*id.)*, not expressly on the basis of the farmer's residence. Accordingly, the 9th Circuit invites clever and disingenuous wording of state laws as a means to circumvent substantive review under the Privileges and Immunities Clause.

It is difficult to conceive of an occupational calling in which the location of the business and the residence of the business operator, like Arizona family farmers Darrel and Diane Kuiper in this case, are more closely tied than that of farming. The most recent Census of Agriculture reveals that 93% of reporting dairy farm operators reside on the farm they operate. U.S. Department of Agric., *1997 Census of Agriculture*, (http://www.nass.usda.gov/census/), Table 51 (Operator Characteristics). By targeting farm location for differential treatment, plaintiffs argued that the California scheme has the practical effect of discriminating against out-of-state farm residents.

It is by now well established that the Privileges and Immunities Clause protects individuals from state-sponsored discrimination in the pursuit of occupational callings or disposition of privately held property on the basis of out-of-state residency or citizenship. *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985); *Baldwin v. Fish and Game Commission of Montana*, 436 U.S. 371 (1978). "[I]t was long ago decided that one of the privileges which the clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State." *Toomer v. Witsell,* 334 U.S. 385, 396 (1948) (citations omitted)).

Further, an occupational calling, such a dairy farming, is one of the "fundamental" rights protected by the Privileges and Immunities Clause. *United Building and Constr.*, 465 U.S. at 219. *Supreme Court of New Hampshire v. Piper*, 470 U.S. at 281. Fundamental rights "are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." *Bates v. Little Rock*, 361 U.S. 516, 523 (1960).

This Court has never held that the Clause guards the rights of citizens only against facial discrimination based on state residency. *See*, *United Building and Construction Trades v. Mayor*, 465 U.S. 208, 216-18 (1984)(The Privileges and Immunities clause protects out-of-state citizens against discrimination based on municipal residency, even if some in-state citizens are also burdened by the rule); *See, Lunding v. New York Tax Appeals Tribunal*, 522 US 287 (1998)(emphasizing need to analyze "practical effect" of state tax law applied to out-of-state residents under Privileges and Immunities jurisprudence.

The 9th Circuit panel expressly acknowledged that it deemed the justiciability of the Privileges and Immunities question to turn on whether there was a Constitutional distinction between facial classification and practical effect. App. A13-14.

While state discrimination against residents or citizens of another state is an essential element of a Privileges and Immunities claim, this Court has never held that the Clause may be invoked only when residential discrimination appears on the face of a state law. There is not, however, the same wealth of jurisprudence defining "discrimination" under this Clause as there is for its more frequently-invoked constitutional cousins, the Commerce Clause and the Equal Protection clause – both of which allow claims of discrimination under a law "as applied" or by "practical

effect" where discrimination is not apparent on its face. This Court has, however, repeatedly instructed that courts should consider the common Constitutional bond between the Privileges and Immunities Clause and the Commerce Clause in the Founder's objectives to "promote[] interstate harmony" and "to create a national economic union." *Supreme Court of New Hampshire v. Piper*, 470 U.S. at 279-80. Indeed, in *Hicklin v. Orbeck*, 437 U.S. 518 (1978), this Court counseled that...

> ...the mutually reinforcing relationship between the Privileges and Immunities Clause of Art. IV, 2, and the Commerce Clause - a relationship that stems from their common origin in the Fourth Article of the Articles of Confederation 16 and their shared vision of federalism, see Baldwin v. Montana Fish and Game Comm'n, 436 U.S., at 379 -380 - renders several Commerce Clause decisions appropriate support for our conclusion.

*Id.* at 531-32.

As used in the instructive and analogous Commerce Clause context, "'discrimination' simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Systems, Inc. v. Dept. of Environmental Quality of the State of Oregon*, 511 U.S. 93 at 99 (1994). Further, commerce discrimination is not limited to the face of a state law, as the 9th Circuit panel would limit it in a Privileges and Immunities context. Such discrimination may take any of three forms: first, the state statute may facially discriminate against interstate or foreign commerce; second, it may be facially neutral but have a discriminatory purpose; third, it may be facially neutral but have a discriminatory effect. *West Lynn Creamery*, 512 U.S. at 201 (directing inquiring courts to look

for discriminatory "purposes and effects); *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979)(state statute may discriminate "either on its face or in practical effect"); *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 353 (1977); *SDDS, Inc. v. State of S.D.* 47 F.3d 263, 267 (8th Cir. 1995) (listing the three types of discrimination and citing cases illustrating each).

As summarized in *Maine v. Taylor*, 477 U.S. 131 (1986):

> [O]nce a state law is shown to discriminate against interstate commerce "either on its face or in practical effect," the burden falls on the State to demonstrate both that the statute "serves a legitimate local purpose," and that this purpose could not be served as well by available nondiscriminatory means.

*Id.*, at 138 (citations omitted). Conforming to Commerce Clause – Privileges and Immunities Clause parallelism, the test described in *Maine v. Taylor* is similar to the test summarized in *New Hampshire Supreme Court v. Piper* applied to discrimination based on residency. 470 U.S. at 284.

The Supreme Court most recently addressed the question of whether state milk price regulation violated the dormant Commerce Clause in *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994). The analytic framework of Justice Stevens's majority opinion, which observed that the Court's decisions have not been "controlled by the form by which a State erects barriers to commerce. Rather, our cases have eschewed formalism for a sensitive, case-by-case analysis of purposes and effects." Id. at 201, *citing Best & Co. v. Maxwell*, 311 U.S. 454, 455-456 (1940)(noting that discrimination may be "forthright or ingenious," and the

Court has a duty to examine whether a state law is discriminatory in "practical operation.").

This Court has undertaken the same type of analytical approach under the Privileges and Immunities Clause. In *Chalker v. Birmingham & N.W. Ry. Co.*, 249 U.S. 522, 527 (1919), condemned a state law that differentiated between individuals based on location of a chief business office inside or outside of Tennessee:

> As the chief office of an individual is commonly in the state of which he is a citizen, Tennessee citizens engaged in constructing railroads in that state will ordinarily have their chief offices therein, while citizens of other states so engaged will not. Practically, therefore, the statute under consideration would produce discrimination against citizens of other states by imposing higher charges against them than citizens of Tennessee are required to pay.

The "practical effect" principle honored in *Chaulker's* substantive review of a Privileges and Immunities challenge was followed much more recently in *Tolchin v. Supreme Court of New Jersey*, 111 F.3d 1099 (3d Cir. 1997), cert. denied, 522 U.S. 977 (1997). *Tolchin* involved an attorney licensing rule, requiring a "bona fide office" within the State of New Jersey. The bona fide office location rule applied to all attorneys, in-state and out-of-state, and was adopted to replace facially discriminatory rules that differentiated between residents and non-residents. The court nevertheless felt bound to examine whether the facially neutral rule produced a "discriminatory effect on nonresidents." Applying conventional Privileges and Immunities analysis, the court concluded...

> ...that the bona fide office and mandatory attendance requirement do not impose a disproportionately heavy burden on nonresidents. These requirements bear a substantial relationship to New Jersey's goal of regulating the practice of law to the benefit of the public and are not overly restrictive of attorneys. Thus, these requirements do not violate the Privileges and Immunities Clause.

111 F.3d at 1109-11.

The practical effect of farm location discrimination in this case is not analytically distinguishable from the business location rules reviewed on the merits for "practical effect" on non-residents in *Chaulker* and in *Tolchin*. The 9th Circuit's *Ponderosa* decision expands the current boundaries of a state's ability to discriminate against non-residents by ingenious rather than forthright devices. This Court's guidance is once again necessary to define the parameters of discrimination tolerated by the Privileges and Immunities Clause and to resolve the conflict between the 3rd Circuit and the 9th Circuit.

## CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

Richard Hesse, Esq.*
2 White Street
Concord, NH 03301
603-228-1541

John H. Vetne, Esq.
15 Powow St.
Amesbury, MA 01913
978-399-2480
*Counsel of Record

December 26, 2001